



# UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE  
United States Patent and Trademark Office  
Address: COMMISSIONER FOR PATENTS  
P.O. Box 1450  
Alexandria, Virginia 22313-1450  
[www.uspto.gov](http://www.uspto.gov)

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/642,442	08/14/2003	Rene Francois Monet	BR6.P29	2471
21792	7590	01/19/2005	EXAMINER	
STRATTON BALLEW 213 S 12TH AVE YAKIMA, WA 98902			HWU, JUNE	
		ART UNIT		PAPER NUMBER
				1661

DATE MAILED: 01/19/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	10/642,442	MONET, RENE FRANCOIS	
	<b>Examiner</b>	<b>Art Unit</b>	
	June Hwu	1661	

– The MAILING DATE of this communication appears on the cover sheet with the correspondence address –

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

1) Responsive to communication(s) filed on November 8, 2004.

2a) This action is FINAL.                    2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

4) Claim(s) 1 is/are pending in the application.

4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.

5) Claim(s) \_\_\_\_\_ is/are allowed.

6) Claim(s) 1 is/are rejected.

7) Claim(s) \_\_\_\_\_ is/are objected to.

8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on 08 November 2004 is/are: a) accepted or b) objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) All    b) Some \* c) None of:

1. Certified copies of the priority documents have been received.
2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

1) Notice of References Cited (PTO-892)  
 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)  
 3) Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
 Paper No(s)/Mail Date \_\_\_\_\_.

4) Interview Summary (PTO-413)  
 Paper No(s)/Mail Date. \_\_\_\_\_.  
 5) Notice of Informal Patent Application (PTO-152)  
 6) Other: \_\_\_\_\_.

Art Unit: 1661

#### **DETAILED ACTION**

The amendment filed November 8, 2004 has been acknowledged.

It is noted that there is a spelling error on the title of the employed color chart on page 3, line 4.

The text of those sections of Title 35, U.S. Code not included in this action can be found in the prior Office action.

#### ***Drawings***

The drawings have been approved.

#### **35 USC § 102**

The rejection of claim 1 under 35 U.S.C. 102 (b) is withdrawn in view of Applicant's amendment.

#### ***Claim Rejections - 35 USC § 112***

Claim 1 remains rejected under U.S.C. 112, first and second paragraphs, for reasons stated in the prior Office actions (dated August 6, 2004, pages 3-7) and as are detailed below.

#### ***Response to Arguments***

Applicant argues that the written description in the disclosure is reasonably complete in accordance to 37 C.F.R. 1.163. In addition, the completeness of the description does not include every quantifiable feature of the plant. This argument has been fully considered, however, is not persuasive because 37 C.F.R. 1.163(a) states, "The specification must contain as full and complete a disclosure as possible of the plant and the characteristics thereof..." thus

Art Unit: 1661

the entire plant, not just some of the characteristics must be described. Moreover, 35 U.S.C. 162 also states that the description must be "as complete as is reasonably possible." See also MPEP 1605.

Applicant argues that a detailed botanical description in the disclosure may appeal to the botanist, patent examiner or patent applicant but does not have any influence to prevent a plant patent from an infringer. This argument has been fully considered, however, is not persuasive because the patentee must first compare his or her plant from the infringer's plant. If the descriptions in the disclosure were lacking or vague of certain characteristics, then it would be difficult to distinguish the patented plant from the infringer's plant. Patent prosecution and infringement are separate issues. The standard for prosecution rests on the rules of 37 CFR 1.163. 37 CFR 1.163 further states "...characteristics thereof that distinguish the same over related known varieties, and its antecedents..."

Applicant argues that a description of variable characteristics does not aid in identifying the plant but further presents vague and ambiguous information. This argument has been fully considered, however, is not persuasive because variable characteristics and ranges would strengthen the disclosure rather than limiting it to an exact size.

Applicant's amendment dated November 8, 2004 failed to address the following grounds of rejection:

A. Applicant has not set forth in the specification how the instant cultivar is distinguished from its parents. 37 CFR 1.163 (a) states, "...the characteristics thereof that distinguish the same over related known varieties, **and its antecedents...**" Correction is required.

B. Applicant has not set forth in the specification a botanical description of the leaf stipules' size, shape and color designation. If available, correction is necessary.

Art Unit: 1661

C. Applicant has not set forth in the specification a botanical description of the leaf glands' size and color designation. If available, correction is necessary.

D. Applicant has not set forth in the specification the size and color designation with reference to the employed color chart of the pit cavity.

Applicant's amendment dated November 8, 2004 failed to address the following new grounds of rejection:

E. Applicant states on page 2, lines 2-3, that the instant cultivar was developed at a controlled breeding program but has not disclosed the female and male parents and how they are distinguished from the instant cultivar (also cited above at A.).

F. Page 5, line 3, the term "Staymen" should be deleted and replaced with -- Stamen --.

G. Page 5, lines 20-23, the recitation with regard to the anthocyanin color as "absent or very weakly expressed" does not appear to correspond with Fig. 6. Fig. 6 appears to show some red coloration near the stem and around the stone. Applicant is required to import into the specification the color designation of the anthocyanin with reference to the employed color chart.

### ***Conclusion***

No claim is allowed.

Art Unit: 1661

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

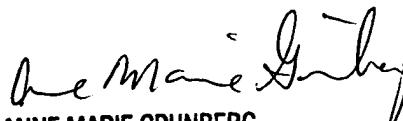
#### ***Future Correspondence***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to June Hwu whose telephone number is (571) 272-0977. The Examiner can normally be reached Monday through Thursday from 6:30 a.m. to 5:00 p.m.

If attempts to reach the Examiner by telephone are unsuccessful, the Examiner's supervisor, Andrew Wang, can be reached on (571) 272-0811. The fax number for the organization where this application or proceeding is assigned is (571) 273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

JH

  
ANNE MARIE GRUNBERG  
PRIMARY EXAMINER